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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. [redacted] 1013

JAMES C. WINSTON,

Petitioner,

v.

PRUDENTIAL LINES, INC.,

Respondent.

BRIEF OF RESPONDENT, PRUDENTIAL LINES, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

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No. 33,013

JAMES C. WINSTON,

Petitioner,

v.

PRUDENTIAL LINES, INC.,

Respondent.

BRIEF OF RESPONDENT, PRUDENTIAL LINES, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

Statement

That respondent-shipowner was sued by the petitioner to recover damages for personal injuries which he allegedly sustained while employed as an Unlicensed Junior Engineer on defendant's vessel, the *SS Attleboro Victory,* in October 1963. The trial commenced on October 24, 1968 and concluded the same day. The jury returned a verdict for the defendant and a judgment was entered on October 25, 1968 dismissing the plaintiff's complaint.

Question Presented

Whether the trial judge abused his discretion in refusing to grant petitioner a continuance to adduce medical

testimony in an action which had been listed on the ready day calendar for approximately one week and in which a Statement of Readiness was filed by the petitioner on January 6, 1967.

Reasons for Denial of Writ

Respondent believes that a chronology of the movement of this case from January 6, 1967, when petitioner filed his Note of Issue and Statement of Readiness until October 24, 1968, when the case was tried, will substantiate the contention of respondent that the trial judge did not abuse his discretion in denying petitioner's motion for a continuance. The pre-trial conference was held before Judge Bonsal on January 26, 1968. The case appeared on the No. 1 Calendar on October 1, 1968, New York Law Journal vol. 160, No. 65, p. 20 in position #90. The final settlement conference was held before Judge Pollack on October 16, 1968, on which date the case was #69 on the Ready Day Calendar. On October 18, 1968, the case appeared in the Ready Day Calendar in position #40, N.Y.L.J. vol. 160, No. 78, p. 71, col. 7. On October 23, 1968, the attorneys for the respective parties received final notice by telephone that the trial would commence on October 24, 1968. The trial commenced on October 24, 1968 and concluded the same day. The jury returned a verdict for the defendant and a judgment was entered on October 25, 1968, dismissing the plaintiff's complaint.

The foregoing chronology of the movement of the case clearly indicates that the parties had ample opportunity to prepare for trial. Prior to the commencement of the trial it developed that respondent's medical expert had retired from practice and resided in California. Respondent accordingly engaged another medical expert and served an amended pre-trial memorandum on plaintiff's counsel identifying the new medical expert. The same course of action was available to petitioner.

As stated by the United States Court of Appeals, Second Circuit, in a Per Curiam decision affirming the action of the trial court in this case, there were two obvious options open to petitioner by which he could have protected his case 415 F.2nd 619 (1969). First, he could have taken the doctor's deposition as a protective measure and could still have produced the medical expert to give testimony in the event the doctor was available to testify. Second, if petitioner knew his witness might not be available he could have moved for relief prior to trial under Calendar Rule 7 (b)(1) of the Rules of the United States District Court, Southern District of New York, which rule provides in part:

> "When a case is advanced to the Ready Day Calendar, if there are any reasons why it may not proceed to trial on 24 hours telephonic notice, counsel shall make immediate application to the Part 1 Judge for an adjournment of the case on the calendar. * * * Such applications must be made in the event that by reason of engagement or illness of counsel, unavailability or illness of witnesses, or for any other reason, the case cannot proceed to trial on 24 hours telephonic notice. The Part 1 Judge will then make whatever disposition is necessary in the interests of justice. * * *"

Respondent was under the same obligation as petitioner to be ready to proceed to trial after having ample opportunity to prepare its defense. It is respectfully submitted that the decision in *Davis* v. *United Fruit Company,* 402 F.2d 328, (2 Cir. 1968), cert. denied February 24, 1969, 89 S.Ct. 869, is dispositive of petitioner's writ. There is a factual similarity between the two cases, the difference being that in the *Davis* case the plaintiff was not available to testify, whereas in this case the plaintiff's medical expert was not available. The contention of petitioner that it was an abuse of the discretion on the part of the trial judge to grant a five minute continuance to permit counsel to call a medical expert to determine whether he could come to

Court immediately, is without merit. Even if the request for a continuance had been granted, it is obvious that the medical expert could not have reached the Court to testify on October 24, 1968. Therefore, the real question is did Judge MacMahon abuse his discretion in refusing to grant a continuance until the afternoon of the following day. Respondent submits that Judge MacMahon did not abuse his discretion. It should be noted that unlike numerous cases which have been dismissed for lack of prosecution, petitioner in this case had his day in Court and the fact that one of his witnesses, whose office is in New York, did not testify, does not warrant interfering with the actions of a conscientious judge who, in respondent's opinion, acted properly.

The language of Judge Kaufman in the *Davis* case, *supra,* is in all respects and for the same reasons, applicable to this case. Judge Kaufman stated, at page 330:

> "The authority to decide whether a continuance should be granted is entrusted to the sound discretion of the trial judge. Before we will upset his ruling, it must be established that he acted arbitrarily. United States v. Ellenbogen, 365 F.2d 982 (2nCir. 1966)."

In concluding his opinion, Judge Kaufman stated, at page 331:

> "We realize that a court must not let its zeal for a tidy calendar overcome its duty to do justice. Nor do we suggest that it is always proper to proceed on the basis of a deposition in the absence of a party. Nonetheless, the fact remains that the calendars of the Southern District Court are clogged and justice is being delayed or perhaps impaired as a result. In order to reduce this choking congestion, the district courts must be permitted to exercise their discretion in appropriate ways that will ensure justice to all who seek it. We will not interfere with the conscientious judge who will not accept the status quo of calendar congestion. The task of updating calen-

dars is arduous, complicated and burdensome. Since the trial judge must be entrusted with the power to alleviate calendar congestion, we shall not put obstacles in his way when he exercises his judgment wisely in achieving the desired goal."

Conclusion

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT A. LILLY
Attorney for Respondent